United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1041

MARIA DIAZ FARO,

Plaintiff-Appellant,

v.

NEW YORK UNIVERSITY,

Defendant-Appellee.

B

P/S

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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Statement of Interest

The Equal Employment Opportunity Commission (EEOC or the Commission) is the agency established by Congress under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972), to administer, interpret, and enforce that Title. The Commission is filing a brief amicus curiae in this case because the standards governing the interlocutory relief which appellant seeks are important in the administration of Title VII.

Questions Presented

1. Whether the district court applied an improper standard in denying plaintiff a preliminary injunction to maintain plaintiff's employment pending resolution of her claim of sex discrimination.

2. Whether the district court erred as a matter of law by failing to award a preliminary injunction to a plaintiff who established a prima facie case of sex discrimination and irreparable harm.

Statement of the Case

This is an appeal from a decision of the District Court, Southern District of New York, denying a preliminary injunction.

On August 24, 1973, the plaintiff, Dr. Maria Diaz Faro, filed charges of employment discrimination on the basis of sex with EEOC and the New York City Commission on Human Rights against New York University Medical School. (NYU or the medical school) She claimed that the medical school had discriminated against her by: (1) failing to consider her for tenure and promotion; (2) attempting to demote her from a full-time to a part-time faculty position to avoid so considering her; and (3) terminating her employment altogether as of December 31, 1973. Dr. Faro sought interlocutory relief to preserve her full-time faculty status and to prevent her termination until the merits of her discrimination claim could be resolved.

The district court denied the TRO. After a three-day hearing, the court (Duffy, J., 73 Civ. 3769) denied Dr. Faro's preliminary injunction motion on the grounds that she had failed to show either irreparable harm or a strong likelihood of success on the merits of her claim.

Statement of Facts

The Equal Employment Opportunity Commission concurs in appellant's statement of facts. We wish, however, to reassert the following details which bear closely on the question of whether appellant Dr. Faro made a sufficient showing of

irreparable harm and a prima facie case of sex discrimination to entitle her to a preliminary injunction.

Dr. Maria Diaz Faro is a research scientist with a Ph.D. in anatomy; her area of specialization is neurological, biochemical and psychological aspects of brain damage suffered at birth. (Def. Exh. E) She came to NYU in 1965 to pursue research, under the direction of Dr. William Windle, in her area of expertise. (Tr. 4) From 1965-1968, Dr. Faro was classed as a full-time instructor and after 1968, a full-time assistant professor in the Department of Rehabilitation Medicine. (Tr. 4-5; Pl. Exh. 1a-1i; Def. Exh. E.; Op. p. 2)

During that time, Dr. Faro's research, as was that of her colleagues' in the Department of Rehabilitation Medicine (Pl. Brief pp. 4-8), was funded both from private and governmental sources. (Tr. 7, 8, 104-116; Def. Exhs. F, G, H, X, Y) In February 1971, the National Institute of Health program grant, which had been awarded to Dr. Windle and which had sustained Dr. Faro's salary from 1965 to 1971, was terminated. (Tr. 8, 105, 107-108; Def. Exhs. F, G, H) When she first realized her funding was running out, Dr. Faro sought a means of continuing her research at the university.

Dr. Rusk, the head of the Department of Rehabilitation Medicine, assisted her in obtaining private research funding by suggesting the names of foundations to whom she should send her proposals for grants. (Tr. 124, 148) In the spring of 1971, Dr. Faro was awarded grants from two foundations - $15,000 from the Beniceke Trust Estate and $2500 from the Helena Rubinstein Foundation. (Tr. 123) After that, she secured support for her project in the amounts of $20,000 from the Hecksher Fund for Brain Damage and $35,000 from the Kappa Kappa Gamma Fraternity Research and Training Fund. (Tr. 123, 148-149) In addition, her salary was paid from a surplus in the budget of the Department of Cell Biology (Tr. 8, 217) and from the general research support grant, a general award made by the National Institute of Health to the medical school to sustain research. (Tr. 8, 220)

In the fall of 1970, in addition to continuing her research, Dr. Faro attempted and did a secure a position teaching gross anatomy in the Department of Cell Biology. (Tr. 18-25, 84) She taught gross anatomy again in the spring and fall of 1971 and medical Spanish in the spring of 1971 and 1972. (Tr. 86, 91, 94-96)

Despite her significant involvement in both research and teaching at the medical school Dr. Faro was asked by Dr. Rusk in July, 1971 to accept a demotion to part-time research associate professor. (Pl. Exh. 4) Of the ten faculty members who also received these letters of demotion, eight accepted the demotion and are still in the department. (Tr. 152-153; Def. Exhs. U, Z) Although her salary and benefits were to remain the same, Dr. Faro refused to accept the new designation because acquiescence meant removal from the "tenure chain". (Tr. 180)

Dr. Rusk testified that his decision to demote Dr. Faro was based on a reevaluation of priorities at the medical school: "the mission of a professor in the university is teaching and research is considered to be a secondary but necessary part...." (Tr. 152) He stated that, with the diminution in available government funds, faculty appointments thus were to reflect either the "research" or "teaching" designation. (Tr. 152) Yet the Department of Rehabilitation Medicine was clearly research-oriented; most faculty members in that department did little teaching (Tr. 165-171); and as Dr. Faro's experience showed, private funding was still available.

After Dr. Faro received the demotion letter from the university, she began vigorously to seek transfer to the Department of Cell Biology (Tr. 183, Op. p. 6), where she already had three semesters' experience teaching. She sought to retain her full faculty status and her place in the "tenure chain". Dr. Sabatini, the department head, was willing to offer her only $4000, a part-time salary, for teaching gross anatomy. In February, 1972, he hired Dr. Emmanuel Alves and in July, 1973, Dr. James Shafland, as associate professors of gross anatomy. (Tr. 30, 135, 142, 144) In Spring, 1971, Dr. Alves had participated in NYU's gross anatomy course as a visiting professor from New York Medical College. He gave demonstrations and lectures on parts of the body to small groups of students, as did Dr. Faro. (Tr. 87-90) Dr. Shafland, a Ph.D. as was Dr. Faro, was hired solely on the basis of an abbreviated resume which merely showed his experience teaching two gross anatomy courses. (Tr. 244-247; Pl. Exh. D) Dr. Potter, the associate dean of the medical school, testified that Dr. Faro was never considered for either Dr. Alves' or Dr. Shafland's positions in the Department of Cell Biology. (Tr. 247-248)

In June, 1972, Dr. Faro received her usual letter of appointment, renewing her contract as full-time assistant professor of rehabilitation medicine for the 1972 - 1973 academic year. (Tr. 31-32; Pl. Exh. 7f) In March, 1973, however, Dr. Faro was notified of Dr. Rusk's decision terminating her employment with the school, effective December 31, 1973, and effectuating the demotion to part-time research associate professor, retroactive to September, 1972. (Tr. 36-37, Pl. Exh. 5) Dr. Faro then sought full-time academic employment elsewhere, without success. (Pl. Exhs. 7a-7h).

Her June, 1973 meeting with Dr. Potter, associate dean of the medical school, bore no fruit. (Tr. 42, 225-226) She met with Dr. Bennett, dean of the medical school, and Dr. Potter on August 6, 1973, but to no avail. (Tr. 45, 227) On August 24, 1973, Dr. Faro filed charges of employment discrimination with EEOC and the New York City Commission on Human Rights. She then brought this suit.

ARGUMENT

I

THE DISTRICT COURT APPLIED AN IMPROPER STANDARD IN DETERMINING WHETHER A PRELIMINARY INJUNCTION WAS APPROPRIATE.

The issue of the standard to be employed when a private person, claiming discrimination in employment, seeks a preliminary injunction to maintain the status quo pending either investigation of the charge by EEOC or final determination by a court, is a matter of considerable importance to the Commission. With approximately 50,000 charges a year being filed with the Commission, it is evident that not all charges can be investigated with the speed that ideally would be desirable. To the extent that private charging parties are in a position to take on themselves the task of attempting to secure the kind of temporary relief which the facts of a particular case indicate as appropriate, the Commission is able to devote its resources to those not in a position to help themselves. Both for the cases which the Commission must bring and those which private parties bring in their own behalf, the standards governing preliminary relief are of great practical importance.

The district court in this case ruled that "the plaintiff must meet the traditional standards of showing a strong likelihood of success on the merits and irreparable harm if the relief sought is not granted." (Op. p. 12)(emphasis supplied). This, we submit, was an erroneous standard. The district court should have applied the rule of this Circuit that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation, and thus for more deliberate investigation, where the balance of hardships tips decidely toward the party requesting the temporary relief. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999 (1969). Accord, Gulf & Western Industries Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973).[1/] Such a standard effectuates the general purpose of a preliminary injunction, to preserve the status quo, pending final determination of the action.

1/ See Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction, 71 Col. L. Rev. 165, 170 (1971).

The rule of this Cirucit is particularly appropriate in Title VII cases.[2/] Title VII is aimed at removing those "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1972). Since the enactment of Title VII, gross overt discrimination has become rare, but subtle and sophisticated forms of discrimination remain all too prevalent.

Title VII employment discrimination cases demand elaborate discovery. It is now well-established that courts must examine statistics, patterns, practices and general policies to ascertain whether discrimination exists, even where the case involves only a claim by a single applicant. McDonnell Douglas v. Green, 411 U.S. 792 (1973). See also Brown v. Gaston County Dyeing Maching Co., 457 F.2d 1377, 1382 (4th Cir. 1972). The broad scope of

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2/ It is generally conceded that the Commission's efforts at conciliation and voluntary compliance may be more fruitful when a preliminary injunction has preserved the status quo. See Young v. International Tel. & Tel. Corp., 438 F.2d 757, 764 (3d Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1971).

the investigatory powers given to the Equal Employment Opportunity Commission, the agency charged with the administration of Title VII, attests to the complicated issues involved and the difficulty of determining discrimination. See e.g., Motorola, Inc. v. McLain, 484 F.2d 1339 (7th Cir. 1973); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355 (6th Cir. 1969); Graniteville Co. v. EEOC, 438 F.2d 33 (4th Cir. 1971). Cf. Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969).

The facts in the instant case call to question whether the very intricate organizational structure of NYU medical school - its funding and tenure system, its research and teaching requirements, its hiring criteria - have operated as tools of discrimination against Dr. Faro, and other women, as well. Sex discrimination in a university setting is especially difficult to prove. "[I]n a case of sex discrimination, as in a case of race discrimination, we very seldom find a resolution of a. . . faculty committee agreeing to engage in sex discrimination.... The existence of such discrimination must therefore be found from circumstantial evidence and inferences from the circumstances." Johnson v. University of Pittsburgh, 359 F.Supp. 1002, 1007-1008 (W.D. Pa. 1973). Yet the fact that discrimination against

women in higher education does exist has been well-documented. Carnegie Commission on Higher Education, Opportunities for Women in Higher Education (McGraw-Hill 1973).

Plaintiff in this case has raised questions so serious and difficult as to make them a fair ground for full litigation under the rule of this Circuit discussed above. Proof of discrimination is particularly arduous here because NYU, as well as most institutions of higher education, employs subjective criteria for hiring and for granting tenure. The granting of tenure, for example, is based upon the recommendation of the department chairman and the scrutiny of a number of faculty committees. (Tr. 153) Dr. Rusk, the Department of Rehabilitation Medicine head, testified that tenure is based upon a judgment as to "who will give the most to the teaching program." (Tr. 164) Yet the record indicates that most faculty members in his department do little teaching. (Tr. 165-171) This Court has recognized the potential for discrimination in the lack of "fixed or reasonably objective standards and procedures for hiring." United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2d Cir. 1971). Judge Duffy determined,

even in the face of the elusive standards upon which NYU relied, that "the questions presented in this case are not so 'substantial and difficult'".(Op. p. 10) and relied on a test applicable to "cases presented to the Court where the issues are fairly straight-forward and can be resolved readily." (Op. p. 12)

Any application for a preliminary injunction involves a matter of balance. Of course a plaintiff must present sufficient facts to show that the case has merit and that the balance of hardship tips in favor of the applicant for relief. The judge in this case, however, applied far too strict a standard when he held that plaintiff had to show a strong likelihood of success on the merits. By so doing, he really decided the merits of the case against the plaintiff without giving her the opportunity to develop the subtle facets of discrimination which inevitably enter into this type of case. The trial judge, in our view, failed to give proper weight to the fact that discrimination on the basis of sex, particularly in the professional field is usually subtle and well-camouflaged, sometimes even unconscious. Had the trial judge been more sensitive to these factors, he would have had to find the probability of success sufficiently

great to meet the standard discussed above and even his improperly strict standard of strong probability of success. On these facts, he should have found that denial of preliminary relief would result in irreparable harm to plaintiff so as to tip the balance in favor of maintenance of the status quo.

II

PLAINTIFF HAS SHOWN A SUFFICIENTLY MERITORIOUS CASE TO JUSTIFY ISSUANCE OF A PRELIMINATY INJUNCTION.

There are two bases on which plaintiff has shown a sufficiently strong probability that she will succeed on the merits to justify issuing her a preliminary injunction (considering the irreparable harm which plaintiff will suffer if preliminary relief is not granted, a matter discussed in Point III infra). The first basis--that the court failed to consider the evidence which indicates that the medical school's alleged reasons for refusing to consider Dr. Faro for tenure were pretextual-- is discussed in detail in the brief of the appellant. Since the Commission believes that it has nothing to add to the considerations there stated, we are not further discussing the matter.

The second basis on which we believe Dr. Faro showed a strong probability of success on the merits is that the university failed to consider her for a position in the Department of Cell Biology although, during the period she was seeking employment, there were two vacancies in that department for which two male professors were ultimately hired. That she was not considered for such positions is undisputed on this record. (Tr. 247-248)

The law is clear that when an employer refuses to consider any interested, available, and qualified person for an available position, that employer has violated Title VII. Gillin v. Federal Paper Board Co., 479 F.2d 97 (2d Cir. 1973).

Under the ruling of the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, (1973), a member of the protected class who claims discriminatory refusal to hire makes out a prima facie case on a showing that, although qualified, the applicant was rejected and the position remained open. Dr. Faro exactly fits that category.

The district judge thought that Dr. Faro did not fall into that category because in his view she was seeking special treatment which would enable her to continue her research,

even if technically assigned to teach anatomy in the Department of Cell Bioloby. This conclusion, we submit, misinterprets the undisputed facts of record.

The district court's characterization of Dr. Faro's position may fairly be said to apply to the situation before July, 1971.

When she first realized her funding was running out, Dr. Faro sought a means of continuing her research at the university, as both Drs. Goodgold and Rusk testified. (Tr. 178, 147) Dr. Faro was understandably upset that she would have to halt her research at a critical time and thus preferred to generate funds to enable her to continue her work. In 1970, Dr. Rusk assisted her in obtaining private research funding. (Tr. 148-149). In order to be in a position to continue her research she was content to teach gross anatomy on a noncompensated basis in the fall of 1970 and was compensated from a surplus in the budget in that department in the spring of 1971. (Tr. 217)

The situation changed, however, after Dr. Faro received the demotion letter from the university. She then began vigorously to seek transfer to the Department of Cell Biology.

(Tr. 183, Op. p.6) Dr. Faro sought the transfer unsuccessfully for nearly two years. She started in July, 1971, when the medical school attempted to terminate her full-time faculty appointment and to remove her from the "tenure chain" (Tr. 180; Pl. Exh. 4), Her efforts continued through and beyond March, 1973, when the medical school unilaterally changed her faculty status (retroactive to September, 1972) to part-time research associate professor and informed her that she would be released from the staff altogether as of December 31, 1973. (Tr. 36-37; Pl. Exh. 5)

Considerable evidence of record shows Dr. Faro's continuous pursuit of a transfer and NYU's continuing failure to consider her, while considering males for the position she sought. The October, 1971 memorandum from Dr. Rusk to Dr. Bennett, dean of the medical school, verifies their understanding of her desire to transfer. (D. Exh. V) The memorandum attaches no conditions whatsoever to the transfer, which was viewed favorably by both Dr. Rusk and Dr. Prutkin of the anatomy department. Despite this recommendation, however, no action was taken by the medical school until Dr. Sabatini, the newly-appointed head of the Department of Cell Biology, finally met with Dr. Faro in April, 1972,

after her repeated efforts to contact him. (Tr. 29, 31, 60-61) Dr. Faro again expressed her interest in "an appointment in the department." (Tr. 29, 60-61) Yet all Dr. Sabatini was willing to offer her was $4000, a part-time salary, for teaching gross anatomy when at this very time he was considering Dr. Alves for a full-time position teaching gross anatomy in the Department of Cell Biology. (Tr. 240) As noted, it is admitted that she was not considered as a candidate for the vacancy in that department.

In her January 29, 1973 letter to Dr. Rusk, Dr. Faro explained that she "would very much like to maintain a position which will have the potential for tenure." (emphasis supplied) (Exh. H to Pl. Affid). Dr. Faro made clear once again, in the February, 1973 meeting with Dr. Goodgold, that her main purpose was to stave off academic demotion. (Tr. 34) In March, 1973 when her status changed, the Department of Cell Biology was again in the process of filling another position teaching gross anatomy for which they eventually hired Dr. Shafland, also a Ph.D. (Tr. 35, 135, 240)

Dr. Faro would hardly have set up specific conditions for another position when faced with demotion to part-time status

and removal from the "tenure chain," especially after the March, 1973 notice of termination. What Dr. Faro sought was maintenance of her full-time position in the tenure chain and consideration for the same positions on the same basis as males. NYU was well aware of this yet never realistically considered Dr. Faro for the regular teaching position. Dr. Potter's protestations that the medical school was attempting to make a variety of options available to Dr. Faro, including the "develop[ment of] a career. . . in another department, such as cell biology" (Tr. 217, 247-248), coupled with his admission that Dr. Faro was not considered for the two teaching vacancies (Tr. 247-248) can be reconciled only on the basis that the university was not seriously considering a woman for a position in the Department of Cell Biology.

Dr. Faro clearly fell within the group of those applicants entitled to initial consideration for the positions available in the Department of Cell Biology. She made her desire to transfer well-known. Her credentials were excellent (Def. Exh. E) and she had direct experience at NYU teaching gross anatomy. (Tr. 86, 91, 93). But she was not treated on

an equal footing with the male applicants, Drs. Alves and Shafland. "Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity." Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971). Yet Dr. Faro's qualifications were not considered.

Judge Duffy presumed that because the faculty of the medical school had over 9% women while the total percentage of females among medical doctors in the nation was 7.1% that NYU had apparently promoted "Sexual Equal Employment Opportunity." (Op. pp.14-15) Even if this were so, this would hardly justify the failure to consider a qualified woman for an open position, merely because she was a woman. As the judge himself recognized there is "ghettoization" of women at the medical school. Women are concentrated in the Departments of Pediatrics and Pathology. (Op. p. 15) Moreover, the relevant statistic for purposes of comparison is the percentage of women doctors in New York City, 13%.[3/] Use of this statistic alone would place the hiring practices of the medical school

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3/ U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC (1) - D34, New York (U.S. Gov. Printing Office 1972).

in a different light.

Dr. Faro thus made out a strong prima facie case that she had not been considered for an appointment on the staff of the Department of Cell Biology because she was a woman.

III

FAILURE TO AWARD DR. FARO A PRELIMINARY INJUNCTION WILL CAUSE HER IRREPARABLE HARM THROUGH DAMAGE TO HER REPUTATION.

The district court judge did not address himself to the question of irreparable harm except to state that plaintiff had failed to make such a showing. (Op. p. 18) Yet there is little question here that the injury to her reputation that plaintiff will suffer as a result of her termination from NYU will be irremedial.

Had she accepted the title of research associate professor of rehabilitation medicine which the medical school offered her in July 1971, Dr. Faro would have certainly removed herself from the tenure chain and thus demeaned her professional stature. By refusing to acquiesce, however, Dr. Faro set the stage for NYU's decision to unilaterally release her as of December 31, 1973. Failure to grant the preliminary injunction has thus resulted in Dr. Faro's separation

from the university with the attendant hardships of termination of her research and loss of livelihood. Such a break in her career will inevitably disadvantage Dr. Faro in the future since her professional reputation in an academic context is based in large part upon her continuous publication, research, and association with a university.

This is not the common case of a salaried employee who is out a job and merely seeks reinstatement and backpay. Dr. Faro is a Ph.D. who possessed while at NYU an outstanding professional reputation which she had developed through extensive and continuous research. In the words of Dr. Rusk, Dr. Faro was a "fine and dedicated scientist" whom he "admired tremendously." (Tr. 148)

Termination of her position with NYU has resulted not only in the disbanding of the primate colony, which Dr. Faro had nurtured and studied since first coming to the university, and thus the cessation of her research, but also the chilling of relations between her and the university, which will undoubtedly make future employment more difficult. Dr. Faro's own experience attests to the difficulty of obtaining a position in higher education. In the Spring, 1973, Dr. Faro was singularly unsuccessful in her efforts to obtain full-time academic employment. (Tr. 37-39; Pl. Exh. 7a-7h)

The injury Dr. Faro suffers is thus in no way compensable in monetary terms and since no adequate remedy at law exists, is appropriate for injunctive relief. Dr. Faro does not claim that it is merely the temporary loss of income, ultimately recoverable if she prevails upon the merits of her cause, which constitutes irreparable injury to her. Cf. Sampson v. Murray, 42 U.S. L.W. 4221 (U.S. Feb. 19, 1974). She seeks to protect her reputation from diminution as a result of discrimination in employment on the basis of sex. Dr. Faro's is the "genuinely extraordinary situation" that the Supreme Court contemplated when it "recognized that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." Sampson v. Murray, supra, 42 U.S.L.W at 4231, n.68.

On the other hand, the detriment to NYU in continuing Dr. Faro's full-time employment is non-existent. The plaintiff is not seeking tenure at this time; she is merely seeking employment while the issue of whether she was improperly denied tenure is resolved. Since Dr. Faro has always been a satisfactory employee, the university will suffer no injury if her employment is continued pending final determination of the action.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the district court be reversed and that Dr. Faro be awarded the preliminary injunction sought below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the United States Equal Employment Opportunity Commission have been mailed this day, postage pre-paid, to the following counsel of record:

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